

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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|--|---|---------------------|
| In the Matter of                             | ) |                     |
|  | ) |                     |
| Applications of AT&T Inc. and                | ) | WT Docket No. 11-65 |
| Deutsche Telekom AG                          | ) |                     |
|  | ) |                     |
| For Consent To Assign or Transfer Control of | ) |                     |
| Licenses and Authorizations                  | ) |                     |

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 16, 2012**

**Released: April 17, 2012**

By the Commission:

**I. INTRODUCTION**

1. In this *Memorandum Opinion and Order*, we consider the application for review filed by the Diogenes Telecommunications Project (“Diogenes”)<sup>1</sup> seeking review of the November 29, 2011 *Order*<sup>2</sup> of the Wireless Telecommunication Bureau (“Bureau”) dismissing without prejudice the applications filed by AT&T Inc. and Deutsche Telekom AG (collectively, the “Applicants”) for consent to the transfer of control of licenses and authorizations. For the reasons stated below, we dismiss the application for review.

**II. BACKGROUND**

2. On April 21, 2011, the Applicants filed applications pursuant to sections 214 and 310(d) of the Communications Act, as amended (“Communications Act” or “Act”),<sup>3</sup> seeking Commission consent to the transfer of control of the licenses and authorizations held by T-Mobile USA, Inc. (“T-Mobile”) and its wholly-owned and controlled subsidiaries from Deutsche Telekom AG (“Deutsche Telekom”) to AT&T Inc. (“AT&T”). On April 28, 2011, the Bureau sought comment on the proposed transaction.<sup>4</sup> In response, the Commission received many petitions to deny and comments, including

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<sup>1</sup> Diogenes Telecommunications Project Application for Review (filed Dec. 27, 2011) (“AFR”). AT&T, Inc. and Deutsche Telekom AG filed oppositions. AT&T Inc. Opposition to Application of Review of Diogenes Telecommunications Project (filed Jan. 11, 2012) (“AT&T Opposition”); Deutsche Telekom AG Opposition to Application for Review (filed Jan. 11, 2012) (“Deutsche Telekom Opposition”). Diogenes filed a reply. Reply of Diogenes Telecommunications Project to Oppositions to Application for Review (filed Jan. 23, 2012) (“Reply”).

<sup>2</sup> Applications of AT&T Inc. and Deutsche Telekom AG For Consent To Assign or Transfer Control of Licenses and Authorizations, WT Docket No. 11-65, *Order*, 26 FCC Rcd. 16184 (WTB 2011) (“*Order*”).

<sup>3</sup> 47 U.S.C. §§ 214(a), 310(d).

<sup>4</sup> AT&T Inc. and Deutsche Telekom AG Seek FCC Consent to the Transfer of Control of the Licenses and Authorizations Held by T-Mobile USA, Inc. and Its Subsidiaries to AT&T Inc., WT Docket No. 11-65, *Public Notice*, 26 FCC Rcd. 6424 (2011).

Diogenes's petition to deny, which requested the Commission designate the application for a hearing.<sup>5</sup> The Applicants filed a joint opposition,<sup>6</sup> and many parties submitted Replies, including Diogenes.<sup>7</sup>

3. On November 22, 2011, the Bureau circulated for consideration by the Commission a draft order designating the proposed AT&T/T-Mobile transaction for an administrative hearing, and that circulation was publicly announced. The Applicants, on November 23, 2011, filed a letter stating that they "withdraw, effective immediately, all of the pending applications in this docket, as listed in the Public Notice released by the Commission on April 28, 2011."<sup>8</sup> On November 29, 2011, the Bureau dismissed the applications without prejudice.<sup>9</sup>

4. In its AFR, Diogenes argues that the Bureau failed to resolve the character issues that had been raised in the merger proceeding.<sup>10</sup> Diogenes states that, in their transfer of control applications, the Applicants made numerous false and misleading statements and material misrepresentations that call their character and fitness to be Commission licensees into question.<sup>11</sup> It asserts that, even if the Applicants do not pursue the merger transaction, their conduct during the application process is so egregious that it may warrant administrative sanction and the Commission should commence a proceeding to resolve these issues.<sup>12</sup>

5. AT&T responds that Diogenes's arguments are moot because when the Commission dismisses an application in a proceeding, it does not entertain an application for review on any issue raised in the proceeding, even if an issue is left unresolved.<sup>13</sup> It cites two Commission decisions, *Delta Radio, Inc.*<sup>14</sup> and *La Star Cellular Telephone Company*,<sup>15</sup> to support its arguments.<sup>16</sup> Deutsche Telekom argues that the dismissal of the merger applications in the *Order* was purely a ministerial act, not requiring a disposition of substantive issues raised in the merger proceeding.<sup>17</sup> It also claims that

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<sup>5</sup> Diogenes Telecommunications Project Petition To Deny (filed May 31, 2011) ("Diogenes Petition"). See also Supplement to Petition To Deny of Diogenes Telecommunications Project (filed Sept. 20, 2011).

<sup>6</sup> Joint Opposition of AT&T Inc., Deutsche Telekom AG, and T-Mobile USA, Inc. to Petitions To Deny or To Condition Consent and Reply to Comments (filed June 10, 2011).

<sup>7</sup> Reply of Diogenes Telecommunications Project to Joint Opposition of AT&T Inc., Deutsche Telekom AG, and T-Mobile USA, Inc. to Petitions To Deny and Reply to Comments (filed June 20, 2011).

<sup>8</sup> See Letter from Patrick J. Grant, Arnold & Porter LLP, and Nancy J. Victory, Wiley Rein LLP, to Marlene H. Dortch, Secretary, FCC (Nov. 23, 2011). See also Letter from Patrick J. Grant, Arnold & Porter LLP, and Nancy J. Victory, Wiley Rein LLP, to Marlene H. Dortch, Secretary, FCC (Nov. 25, 2011) (relating to File Nos. 6013CWSL11, 6014CWSL11, 6015ALS11, and 6016CWSL11 filed manually).

<sup>9</sup> See *Order*, 26 FCC Rcd. 16186 ¶ 10.

<sup>10</sup> AFR at ii, 3.

<sup>11</sup> *Id.* Specifically, Diogenes claims that the Applicants made false statements about facing severe network spectrum and capacity constraints, about T-Mobile lacking a clear path to LTE, and about the number of jobs the merger would create or eliminate. *Id.* at 5-22.

<sup>12</sup> AFR at iii, 3.

<sup>13</sup> AT&T Opposition at 2-3.

<sup>14</sup> Application of Delta Radio, Inc., *Memorandum Opinion and Order*, 18 FCC Rcd. 16889 (2003) ("*Delta Radio*").

<sup>15</sup> Applications of La Star Cellular Telephone Company, *Decision*, 7 FCC Rcd. 3762 (1992) ("*La Star I*"), vacated sub nom. *Telephone and Data Systems, Inc. v. FCC*, 19 F.3d 655 (D.C. Cir. 1994), *aff'd on remand sub nom.* La Star Cellular Telephone Company, *Memorandum Opinion and Order*, 9 FCC Rcd. 7108 (1994) ("*La Star II*").

<sup>16</sup> AT&T Opposition at 3.

<sup>17</sup> Deutsche Telekom Opposition at 2-3.

Diogenes has failed to meet the requirements of section 1.115 of the Commission's Rules,<sup>18</sup> and that it has failed to identify any misrepresentation that Deutsche Telekom or T-Mobile USA made to the Commission.<sup>19</sup>

6. In its reply, Diogenes disputes that *Delta Radio* and *La Star Cellular Telephone Company* are relevant precedent and asserts that the oppositions filed by AT&T and Deutsche Telekom are without merit.<sup>20</sup>

### III. DISCUSSION

7. We dismiss the AFR on two separate and independent bases, each of which is sufficient to warrant dismissal. We discuss both of those grounds below.

#### A. Lack of Standing

8. To establish party-in-interest standing to challenge an application, a petitioner must allege facts sufficient to demonstrate that grant of the application would cause it to suffer a direct injury.<sup>21</sup> In addition, petitioners must demonstrate a causal link between the claimed injury and the challenged action.<sup>22</sup> To demonstrate a causal link, petitioners must establish that the injury can be traced to the challenged action and the injury would be prevented or redressed by the relief requested.<sup>23</sup> Section 1.115(a) of the Commission's rules specifically provides that "[a]ny person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission."<sup>24</sup> An organization may meet these standards in its own right or may demonstrate that one or more of its members meets these requirements.<sup>25</sup>

9. The Diogenes Petition initially states that AT&T's application to acquire T-Mobile should be denied<sup>26</sup> but concludes by asserting that "the application for assignment of licenses from T-Mobile to AT&T should be designated for hearing to determine whether AT&T and T-Mobile have the necessary character qualifications to remain Commission licensees."<sup>27</sup> In its AFR, Diogenes states that the question presented for review is whether the Bureau erred in dismissing the applications proposing to transfer control of T-Mobile and its affiliates to AT&T without addressing the basic qualifications issues raised in the proceeding.<sup>28</sup> Diogenes further states that "the issues raised in this proceeding bear directly

<sup>18</sup> *Id.* at 3-5. Specifically, Deutsche Telekom alleges that Diogenes has failed to identify a Bureau action for which relief under 47 C.F.R. § 1.115 would be appropriate. Deutsche Telekom asserts that none of Diogenes's allegations fits any of the five categories listed in section 1.115(b)(2), which is necessary to support an application for review.

<sup>19</sup> Deutsche Telekom Opposition at 5-6.

<sup>20</sup> Reply at 2-5.

<sup>21</sup> *Wireless Co., L.P., Order*, 10 FCC Rcd. 13233, 13235 ¶ 7 (WTB 1995) ("*Wireless Co.*"), citing *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972).

<sup>22</sup> *Wireless Co.*, 10 FCC Rcd. at 13235 ¶ 7.

<sup>23</sup> *Id.*

<sup>24</sup> 47 C.F.R. § 1.115(a). The section further provides that a person who has not previously participated in a proceeding may file an application for review so long as he includes a statement "describing the manner in which he is aggrieved by the action taken and showing good reason why it was not possible for him to participate in the earlier stages of the proceeding." *Id.*

<sup>25</sup> See, e.g., *In re Friends of the Earth, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd. 23622, 23622-23623 ¶¶ 2-3 (2003).

<sup>26</sup> Diogenes Petition at i.

<sup>27</sup> *Id.* at 29.

<sup>28</sup> AFR at 1.

on their current status as holders of Commission licenses numbering in the thousands,” and that the conduct of AT&T and T-Mobile “during the course of this proceeding is so egregious as to warrant administrative sanctions, up to and including revocation of their licenses.”<sup>29</sup>

10. Diogenes bases its claim of standing on alleged injury to its member Scott Karren, a former customer of AT&T Wireless who was a current customer of T-Mobile at the time the Diogenes Petition was filed on May 31, 2011.<sup>30</sup> Mr. Karren expresses concerns about once again being a customer of AT&T.<sup>31</sup>

11. We find that Diogenes lacks standing to seek review of the dismissal of the applications. Mr. Karren has suffered no injury-in-fact from the Bureau’s dismissal of AT&T’s and T-Mobile’s applications. If anything, the Bureau’s action has alleviated the asserted harm, namely, that the transaction would force Mr. Karren to become an AT&T customer. Likewise, the relief that Diogenes is now seeking in this proceeding – the designation for hearing of the character qualifications of both AT&T and T-Mobile and the possible revocation of all of their licenses – would not prevent Mr. Karren’s claimed injury, i.e., that his T-Mobile account will be taken over by AT&T. Indeed, if T-Mobile’s licenses were revoked, Mr. Karren would be unable to remain a T-Mobile customer as he desires to do. We accordingly dismiss the AFR due to Diogenes’s lack of standing to challenge the dismissal of the applications.

#### **B. Mootness**

12. As an alternative and independent basis for dismissal, we find that the issues raised in the Diogenes AFR are moot or beyond the scope of this proceeding. In *Delta Radio*, Mondy-Burke Broadcasting Network (“MBN”), the second highest bidder for an FM broadcast station in Auction No. 25, filed a petition to deny the application of the winning bidder, Delta Radio, Inc. (“Delta”), which the Commission denied.<sup>32</sup> MBN filed an application for review, which was later dismissed as moot, because Delta had defaulted on its auction payment obligation and the Commission had dismissed Delta’s application.<sup>33</sup> The Commission found that, because it had affirmed the dismissal of Delta’s application, MBN’s application for review was moot – the relief it sought having already been granted in the form of the dismissal. The Commission therefore dismissed the MBN application for review.<sup>34</sup>

13. In *La Star I*, La Star Cellular Telephone Company (“La Star”) appealed a decision of the Administrative Law Judge (“ALJ”) finding La Star to be ineligible to hold a cellular frequency block B license.<sup>35</sup> Another party filed exceptions to the decision, arguing that the ALJ should have adopted findings that La Star’s principals had misrepresented facts and lacked candor in their hearing testimony in the proceeding.<sup>36</sup> The Commission affirmed the ALJ’s finding of La Star’s ineligibility on the grounds that La Star was not controlled by a wireline-eligible carrier and thus could not file for frequency Block

<sup>29</sup> AFR at 3. See also AFR at 26-27.

<sup>30</sup> Diogenes Petition at 2.

<sup>31</sup> *Id.*; Diogenes Petition, Declaration.

<sup>32</sup> *Delta Radio*, 18 FCC Rcd. at 16889 ¶ 2.

<sup>33</sup> *Id.* at 16899 ¶ 26.

<sup>34</sup> *Id.*

<sup>35</sup> *La Star I*, 7 FCC Rcd. at 3762 ¶ 2. See also Applications of La Star Cellular Telephone Company, *Initial Decision*, 6 FCC Rcd. 6860, 6888 (Chachkin, ALJ 1991). The ALJ found La Star not eligible to hold a cellular frequency block B license because it was not controlled by a wireline carrier with a presence in the New Orleans, Louisiana MSA.

<sup>36</sup> See *La Star I*, 7 FCC Rcd. at 3762 ¶ 3; see also Application of Telephone and Data Systems, Inc., *Memorandum Opinion and Order and Hearing Designation Order*, 9 FCC Rcd. 938, 941 ¶ 8 & n.12 (1994).

B.<sup>37</sup> Because the Commission's ineligibility conclusion resulted in the dismissal of La Star's application, the Commission found it unnecessary to resolve the issue of candor raised by the other party in exceptions and dismissed those exceptions as moot.<sup>38</sup>

14. Similarly, in the instant matter, the Applicants' transfer of control applications were withdrawn by the Applicants and dismissed by the Bureau. The Applicants' decision to withdraw and the Bureau's decision to dismiss the transfer of control applications in the face of that withdrawal effectively provides the relief sought in Diogenes's Petition to the extent that it asked the Commission not to consent to the applications at issue in this proceeding.<sup>39</sup> Following *Delta Radio* and *La Star I*, we conclude that this aspect of the instant application for review is moot.

15. Diogenes attempts to distinguish *Delta Radio* on the grounds that the Commission's dismissal of Delta's application was the entire relief sought by MBN in its petition to deny.<sup>40</sup> In its petition to deny, Diogenes similarly asks the Commission to deny the transfer of control applications, but also asks that the character qualifications of AT&T and T-Mobile to hold their existing licenses and the possible revocation of those licenses be considered. As previously stated, to the extent that Diogenes sought a hearing to determine whether the Applicants lack the necessary character qualifications to be licensees for the licenses at issue in this proceeding, it was not necessary for the Bureau to reach that issue once the applications were withdrawn and dismissed. Revocation of the applicants' existing licenses is beyond the scope of this transfer of control proceeding.

16. Diogenes also attempts to distinguish the instant matter on the grounds that, in *La Star I*, the Commission "expressly acknowledged and preserved for a later time the substantial questions of qualification raised therein . . . and the Commission did indeed revisit the matter, designating the character issue for hearing."<sup>41</sup> We disagree that this is a material distinction. By preserving an option to entertain qualification issues in the future in *La Star I*, the Commission did not commit to do so. Moreover, our decision not to address the character issues in this proceeding does not prejudice how those issues would be addressed if raised in another context.

#### IV. CONCLUSION

17. We find that Diogenes lacks standing to pursue the relief requested in its AFR. Alternatively, we find that the issues raised in the application for review are moot or beyond the scope of the proceeding. We thus dismiss the application for review filed by Diogenes.

#### V. ORDERING CLAUSE

18. Accordingly, IT IS ORDERED that, pursuant to sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), and section 1.115 of the

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<sup>37</sup> *La Star I*, 7 FCC Rcd. at 3762 ¶ 3.

<sup>38</sup> *Id.* at 3767 n.3.

<sup>39</sup> Diogenes Petition at 1 ("[Diogenes] hereby requests that the Federal Communications Commission (FCC) deny the proposed transaction"); *id.* at i, ii; *see also, e.g.*, Warren C. Havens, *Order on Reconsideration*, 26 FCC Rcd. 13064, 13064 ¶ 1 (MD WTB 2011) ("Petitioners have received all the relief that they can with respect to the above-captioned application. Because we are under no obligation to resolve unnecessary issues, we conclude that the petition to deny was properly dismissed as moot.").

<sup>40</sup> Reply at 2-3.

<sup>41</sup> Reply at 3.

Commission's Rules, 47 C.F.R. § 1.115, the Application for Review filed by the Diogenes Telecommunications Project on December 27, 2011, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary